U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: June 18, 1998

Case No.: 97 INA 530

In the Matter of:

GOLDEN STATE TILE AND CONSTRUCTION,
Employer,

on behalf of

MARIAN A. TAN,
Alien.

Appearance: L. L. Lopez, Esq., for the Employer

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MARIAN A. TAN ("Alien") by GOLDEN STATE TILE AND CONSTRUCTION ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26. [1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of

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1The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On January 26, 1995, the Employer applied for alien labor certification on behalf of the Alien for the position of Junior Designer. The duties of the job were described by the Employer as follows:

> Research plan, draft and design building projects for clients, applying knowledge of design, construction procedures, zoning and building codes. Consult with client to determine functional and spatial requirements of new structure or renovation, and prepare information regarding design, specifications, materials, color, equipment, estimated costs and construction time. Prepare scale drawings and contract documents for building contracts. Represent client in obtaining bids and awarding construction contracts. Administer construction contracts and conduct periodic on-site observation of work during construction to monitor compliance with plans. Use CAD software.

AF 28.[2] On the basis of the Employer's description, the job was classified as "Architect" under DOT Occupational Code No. 001.061-010.[3] Although nine U. S. workers applied for the job, none of them was hired. AF 22.

The Alien. The Alien graduated college in the Philippine Islands with a baccalaureate degree in Architecture in 1977. AF 131. Her applicable work experience began in February 1978 and continued to the date of application, including services as an architect, lecturer in architecture, and project architect in Manila. After arriving in the United States, she worked as a draftsman and later as a CAD operator employed by several architectural and construction firms in Torrance, Compton, and Los Angeles, California, until April 1994, when she was hired as an "Architectural Consultant" by a firm in the "Steel Homes" business. AF 133-134. In August 1994, she became Employed by the Employer as an "Architectural Consultant," and engaged in all of the activities described in Item 13 of Form ETA 750A. Because her previous job as "Architectural Consultant" for CHS Component Housing Systems lasted from April 1994 to August 1994, and that her only jobs before that time were as an architect, draftsman, and CAD

2The wage offered was $13.96 per hour from 8:00 AM to 4:30 PM, for a forty hour week, with overtime as needed at time and a half. The education required was a baccalaureate degree in Science in Architecture as the Major Field of Study. There were no Other Special Requirements for the job. *Id.*

3Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

operator, it is inferred that she acquired all of the other skills listed in the Job Description [4] during the period of her employment by CHS Component Housing Systems, which the Alien represented to be approximately five months in her statement of qualifications. AF 132. [5]

Notice of Findings. On December 16, 1996, the Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification. AF 19-21. The bases for the CO's finding were (1) that U. S. workers were rejected because of undisclosed job requirements. Citing 20 CFR § 656.21(b)(1)(i)(F), the CO explained that U. S. workers Childs, Pietro, Lee, Nevsky and DeLaCuesta were rejected as unqualified on grounds that they did not meet a job requirement of two years' experience. As the Employer had deleted that requirement from the application, however, it could not have justified the rejection of U. S. workers as unqualified for this position. AF 20. (2) The Employer's recruitment effort was found to be untimely and insufficient as to qualified U. S. job applicants Kirkpatrick, Dede, and Beltramo. Beltramo further reported that the Employer did not contact him at all.

As to (1) the CO then directed the Employer to submit rebuttal evidence proving that the U. S. workers Childs, Pietro, Lee, Nevsky and DeLaCuesta were not qualified for the position offered. As to (2) the CO directed the Employer to file rebuttal evidence to prove that its attempts to interview U. S. applicants Kirkpatrick, Dede, and Beltramo were timely and conformed to the Act and regulations. AF 20-21.

Rebuttal. The Employer filed its rebuttal on January 15, 1997. AF 15-18. [6] (1) The Employer said that U. S. workers Childs, Pietro, Lee, Nevsky and DeLaCuesta were interviewed from the End of July 1995 to the middle of August 1995, pointing out that it did not withdraw the two year experience requirement until the letter by Mr. Margalit dated October 28, 1996, when the job title was changed to "Junior Designer" at the suggestion of the State Employment Security Agency ("SESA"). AF 26. The Employer contended that it should not be held to have violated the regulations by this change in hiring criteria that was made after the job was advertised and interviews were completed. Under the circumstances. Employer said it should have been permitted to readvertise the position as altered pursuant to remand instructions. AF 17.

4Those duties were listed *supra* as the following, "Research plan, draft and design building projects for clients, applying knowledge of design, construction procedures, zoning and building codes. Consult with client to determine functional and spatial requirements of new structure or renovation, and prepare information regarding design, specifications, materials, color, equipment, estimated costs and construction time. Prepare scale drawings and contract documents for building contracts. Represent client in obtaining bids and awarding construction contracts. Administer construction contracts and conduct periodic on-site observation of work during construction to monitor compliance with plans." The only duty omitted from those listed was CAD operation.

5 It should be observed that the CO did not provide information as to whether or not any connection existed between Golden State Tile and Construction and CHS Component Housing Systems.

6The application, all communications to the U. S. job applicants, and rebuttal statements by Employer are signed by Jacob I. Margalit as its "Owner."

(2) Regardless of the dates of referral or response, the Employer said Dede was duly interviewed, but indicated that he was not willing to accept the pay scale offered for this position. The Employer disputed the date when the Kirkpatrick referral was sent and asserted that the date of its response was timely. The Employer said that Kirkpatrick did not appear at the scheduled interview, however, and that he was rejected for this reason. The Employer finally contended that Beltramo was never referred to it by the SESA and never attempted to contact the Employer on his own initiative.

Final Determination. The CO issued a Final Determination denying certification on February 3, 1997. AF 11-12. The CO stated that Employer's rebuttal failed to sustain its burden of proof in answering the NOF findings. (1) Confirming that the case was remanded during September 1996 because the two-year requirement appeared to be restrictive, the CO said Employer's amendment of Form ETA 750A reflected a finding that the nature of the job duties was not accurately reflected in Item 14. The CO explained that this requirement was excessive from the time the application was first submitted, and that the hiring criteria that the Employer had applied to applicants responding to its May 1995 recruitment effort was restrictive. Observing that the NOF gave Employer the opportunity to show that the U. S. applicants were not qualified, the CO explained that it was expected to demonstrate that the job seekers did not meet either the original or the amended criteria. As the Employer cited no regulatory authority for its request to retest the labor market, the CO concluded that the rejected job applicants, Childs, Pietro, Lee, Nevsky and DeLaCuesta, appeared qualified in the absence of concrete evidence to the contrary and concluded that alien labor certification could not be approved in the presence of able and qualified U. S. applicants for the position offered. 20 CFR § 656.1. (2) Addressing the Employer's failure to contact U. S. applicants within the regulatory criteria, the CO first found the Employer's contentions as to Mr. Dede inconsistent with the evidence of record, which indicated that this candidate was not reached until one month after his resume was sent to the Employer. The CO then pointed out the contradiction between Employer's contention that it had sent a letter to U. S. worker Beltramo and its later contention that it never received a resume from this applicant, concluding that the Employer failed to prove a good faith effort to recruit either of these two candidates. AF 12.[7]

Appeal. Employer requested administrative-judicial review by letter dated March 6, 1997. AF 01-07. The Employer's appeal traversed the reasons for rejection of the application for alien labor certification in the Final Determination, repeating and rearguing points initially discussed in rebuttal, and attaching new evidence(AF 08-10).

Discussion

The arguments offered in the appeal repeated the contentions of the rebuttal. The Employer then extended its rebuttal with answers to the NOF that the CO considered in the Final

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7The Panel has examined AF 110 in considering the Employer's rebuttal and the CO's Final Determination in connection with Mr. Beltramo.

Determination and rejected as untimely. **Harry Tancredi**, 88 INA 441(Dec. 1, 1988)(*en banc*). The new evidence that Employer first submitted with the appeal cannot be considered. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992.)

The issue as to whether U.S. workers were rejected for lawful job-related reasons is grounded on the CO's finding that the Employer refused to hire applicants Childs, Pietro, Lee, Nevsky and DeLaCuesta, all of whom it rejected as unqualified on grounds that they did not meet its hiring criterion of two years' experience. See 20 CFR §§ 656.21(b)(1)(i)(F) and 656.21(b)(2). An employer's use of unduly restrictive job requirements in the alien labor certification process is proscribed by 20 CFR § 656.21(b)(2) unless the requirements are adequately documented as arising from business necessity. **Information Industries, Inc.**, 88 INA 082 (Feb. 9, 1989) (*en banc*), explained that the requirement must bear a reasonable relationship to the occupation in the context of the employer's business, and that such a job requirement must be essential to performing in a reasonable manner the job duties described by the employer. As the length of the Standard Vocational Preparation ("SVP") for an architect's position is unaffected by the change in nomenclature that the Employer's rebuttal discussed, its elimination of the two years' experience requirement did not alter the occupational qualifications stated in item 13 of Form ETA 750 A when Employer changed the title from "Architectural Consultant" to "Junior Designer." Consequently, the Employer failed to establish that its experience requirement bore a reasonable relationship to the occupation or was essential to performing in a reasonable manner the job duties described. **Aguarius Enterprises**, 87 INA 579 (Mar. 24, 1988).

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, it must comply with the Act and regulations when employer seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. As the qualifications of DeLaCuesta, Childs, and Lee met the DOT description of this occupation and the Employer's job description in Item 13 of ETA Form 750 A, they were adequate for the amended level that the Employer described in its rebuttal. Moreover, several U. S. job applicants qualified for the architectural position offered under both of the job titles used in Employer's original and amended applications. Beltramo's work as an architect extended from 1989 to the date he responded in 1995. AF 107-109. Dede's architectural experience began in October 1973 and continued to July 1996. AF 93-96. Kirkpatrick's experience ran from 1985 to 1995. AF 77-81. Nevsky's experience exceeded ten years, extending from 1977 to August 1995. AF 71-74. Pietro's experience extended from June 1980 to October 1994. AF 58-59.

Rejection of a U. S. worker who satisfies the minimum requirements specified in employer's ETA 750A and advertisement is unlawful. **American Cafe**, 90 INA 026(Jan. 24, 1991). At 20 CFR § 656.24(b)(2)(ii) the regulations provide that a job applicant is considered qualified for the position who meets the minimum requirements specified by the employer's application for labor certification. **The Worcester Co, Inc.,** 93 INA 270 (Dec. 2, 1994). Even if a job applicant's resume does not meet all of the job requirements, if that resume shows a broad range of experience, education, and training, the reasonable possibility arises that the applicant is

qualified, and the employer is expected to investigate further the applicant's credentials by an interview or otherwise. **Dearborn Public Schools,** 91 INA 222 (Dec. 7, 1993) (*en banc*); **Gorchev and Gorchev Design,** 89 INA 118(Nov. 29, 1990(*en banc*).[8]

The resumes cited above indicate that one or more of the U. S. job applicants for the position that this Employer offered was qualified and was available to be hired, even though the Employer reported that it rejected all of the candidates referred. After examining the application, NOF, rebuttal, Final Determination and the Employer's appeal the Panel agrees that the evidence of record supports the CO's finding that the Employer failed to engage in a good faith recruitment effort. **H. C. LaMarche Enterprises**, 87 INA 607(Oct. 27, 1988). As the denial of certification is affirmed for these reasons, the following order will enter.

Order

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the

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8Although the alien appears well qualified for the job and may even be better qualified for the position than any of the U.S. applicants, it is well settled that an employer cannot reject U.S. applicants on that basis. **K Super KQ 1540-A.M.**, 88-INA-397(Apr. 3, 1989)(*en banc*); **Morris Teitel**, 88-INA-9(Mar. 13, 1989)(*en banc*).

basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.